

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

14-Cr.-0008 (SAS)

-v-

DEVYANI KHOBRAGADE

NOTICE OF MOTION

-----X

SIRS:

PLEASE TAKE NOTICE, that upon the Affirmation of **Daniel N. Arshack, Esq** and the annexed Memorandum of Law and exhibits attached thereto, the undersigned, on behalf of Dr. Devyani Khobragade will move in the United States District Court in the Southern District of New York, located at 500 Pearl Street, New York, New York, 10007 in the Courtroom of The Hon. Shira A. Scheindlin, on **Friday, January 31, 2014**, at 9:30 o'clock in the forenoon or as soon thereafter as the parties may be heard, for an Order:

1. Dismissing the instant indictment and proceeding;
2. Terminating any and all conditions of bail previously imposed by the Court at the Defendant's initial appearance in this matter on December 12, 2013;
3. Exonerating any bail or bond previously posted on behalf of the Defendant to secure her freedom during the pendency of this matter;
4. Terminating any arrest warrants presently or previously filed in efforts to secure the Defendant's attendance in any future court proceedings; and such other and further relief as this Court may deem proper and just.

Dated: New York, New York
January 14, 2014



Daniel N. Arshack, Esq. (DA2036)
Arshack, Hajek & Lehrman, PLLC
1790 Broadway – 7th Floor
New York, New York 10019
212-582-6500 Phone
212-459-0568 Fax

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

14-Cr.-0008 (SAS)

-v-

DEVYANI KHOBRAGADE

AFFIRMATION IN SUPPORT OF
MOTION TO DISMISS

-----X

DANIEL N. ARSHACK, an attorney duly admitted to the practice of law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am Counsel to Dr. Devyani Khobragade in the instant proceeding and, as such, I am fully familiar with the facts and circumstances described herein.
2. I make this Affirmation in support of Ms. Khobragade's motion to dismiss the instant proceeding as a nullity because both at the time of her arrest, as well as at the time of her subsequent indictment, Defendant was cloaked in diplomatic immunity and has absolute immunity from any criminal prosecution in the United States.
3. While Dr. Khobragade's diplomatic status deprived the Court of personal jurisdiction over her at the time of her arrest and later indictment, it nonetheless has subject matter jurisdiction to entertain Defendant's instant motion to dismiss pursuant to *28 U.S.C. §1351* and *22 U.S.C. §254d*.
4. The Court should grant the relief requested and issue an Order:
 - a. dismissing the indictment and instant proceeding;
 - b. terminating any and all conditions of bail previously imposed by the Court at the Defendant's initial appearance in this matter on December 12, 2013;
 - c. Exonerating any bail or bond previously posted on behalf of the Defendant to secure her freedom during the pendency of this matter;

- d. Terminating any arrest warrants presently or previously filed in efforts to secure the Defendant's attendance in any future court proceedings.

Dated: New York, New York
January 14, 2014

A handwritten signature in black ink, appearing to read "Daniel N. Arshack", with a long horizontal flourish extending to the right.

Daniel N. Arshack, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

14-Cr.-0008 (SAS)

-v-

DEVYANI KHOBRAGADE

-----X

**DEFENDANT’S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS PURSUANT TO 22 U.S.C. 254d
ON THE GROUNDS OF DIPLOMATIC IMMUNITY**

Daniel N. Arshack, Esq. (DA2036)
Arshack, Hajek & Lehrman, PLLC
1790 Broadway – 7th Floor
New York, New York 10019
212-582-6500 Phone
212-459-0568 Fax

OVERVIEW OF ARGUMENT

The pending indictment against Dr. Khobragade, and bail conditions imposed upon her after she was arrested and released on December 12, 2013, should be dismissed as this proceeding is a nullity. As a matter of law, the Court does not have jurisdiction over the Defendant due to the Defendant's diplomatic status which provides her absolute immunity from criminal prosecution in the United States. Because Dr. Khobragade was cloaked in diplomatic immunity at the time of her arrest on December 12, 2013, as well as the time of the filing of the subsequent indictment on January 9, 2014 (on which she was not re-arrested or arraigned), she cannot be prosecuted thus necessitating a dismissal of the indictment and proceeding. The conditions of Dr. Khobragade's post-arrest release and bail and bonds posted to secure her attendance in Court must also be rescinded as those restrictions on Dr. Khobragade's liberty may not be required of her as a diplomat who is absolutely immune from criminal prosecution. Further, any open arrest warrants against Dr. Khobragade or requests for extradition with regard to this matter should also be vacated as they too are nullities since the instant proceeding is subject to dismissal.

PROCEDURAL SEQUENCE OF EVENTS

As the Court is aware, on December 12, 2013, Dr. Devyani Khobragade, then the Deputy Consul General to the Consulate of India in New York was arrested on a Complaint in this matter as she departed her daughter's public elementary school on West 97th street in Manhattan after dropping off her older child. After she was delivered into the custody of the United States Marshall's Service, she was placed in handcuffs, subjected to a strip search and a physical search and observation of the most intimate portions of her person, and thereafter brought before Magistrate Netburn on that same day. Undersigned Counsel for the Defendant

claimed, on the record during her presentment that the arrest and prosecution was invalid because she was, at that time, cloaked with full diplomatic immunity. Dr. Khobragade's claim of immunity was absolutely correct because on August 26, 2013, she had been appointed a Special Advisor to the United Nations and was given a Blue Card (a card signifying her full diplomatic status) by the U.N. during the Indian Prime Minister's visit. Based on that credential and consistent with The United States State Department publication "Diplomatic and Consular Immunity –Guidance for Law Enforcement and Judicial Authorities"¹, such appointment by the United Nations vested Dr. Khobragade with full diplomatic immunity as of August 26, 2013. By its own terms, that full diplomatic Status and its attendant immunity continued unabated through and including December 31, 2013. *See, UN Accreditation Record attached as Exhibit 1.*

Dr. Khobragade was not formally arraigned on the charges in the Complaint, but was nonetheless required to post a bail bond and three other people also signed bonds, and she was required to submit to other limitations on her freedom all ostensibly to ensure her attendance as the case proceeded. The matter was adjourned for 30 days and scheduled for a Preliminary Hearing to take place on Monday, January 13, 2014.

However, on the evening of January 8, 2014, following her transfer on December 20, 2013, from employment in the Indian Consulate to the position of Counselor at the Permanent Mission of India to the United Nations, a position which carried with it full diplomatic status, the U.S. Department of State sent a notice to Dr. Khobragade advising her that she had been fully credentialed as a diplomat, with its concurrent privileges and immunities. *See, January 8, 2014, Credentialing Letter from the United States to Mrs. Khobragade, attached as Exhibit 2.*

On January 9, 2014, the Government requested that India wave the immunity which had attached due to the diplomatic accreditation. Immediately upon receiving that request, the Indian

¹ <http://www.state.gov/documents/organization/150546.pdf>

Government declined to waive the immunity, legally the choice was theirs to make, not Dr. Khobragade's and, in response, the United States through the Department of State declared that Dr. Khobragade must leave the United States immediately. *See, January 9, 2014, Diplomatic Note from the United States to India, attached as Exhibit 3.*

Thereafter, also on January 9, 2014, the Government sought and obtained an indictment against Dr. Khobragade for the same exact offenses previously charged in the Complaint. Obviously, the Government knew when it obtained that indictment that there could be no prosecution of Dr. Khobragade since her diplomatic status had already been changed and she was therefore immune from prosecution.

As a result of her diplomatic status and her subsequent expulsion, Dr. Khobragade did not get arraigned on the instant indictment. Nor could she have been arraigned, had she been in the court, since, as will be discussed below, by virtue of her diplomatic status, the court no longer had jurisdiction over her. Despite an oral request and the submission of papers to the court and to the prosecution calling for the dismissal of the case on January 9, 2014, the Court suggested that the matter would lay fallow until such time that the Defendant were brought before it to answer the charges. As a result, the Court did not rescind the conditions of release or exonerate the bail bond previously posted by the Defendant to ensure her attendance in Court which obviously is not required in light of her diplomatic immunity.

Dr. Khobragade, through her Counsel, now formally moves this Court to dismiss the instant proceeding, to rescind the conditions of her release, and eliminate her bail conditions as she is immune from criminal prosecution in the United States as she was obligated, by the United States government, to leave the jurisdiction.

THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS MOTION

Because Dr. Khobragade has full diplomatic status, she has automatically been vested with diplomatic immunity from criminal liability in the United States. She therefore moves pursuant to 22 U.S.C. §254d -- Dismissal on motion of action against individual entitled to immunity - which holds that

Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

Relevant cases have consistently held that diplomats accredited to the United Nations are accorded the same diplomatic immunity as diplomats accredited to the United States. *Tachiona v. United States*, 386 F.3d 205 (2nd Cir. 2004); *See also, Devi v. Silva*, 861 F.Supp.2d 135, 141 (S.D.N.Y. 2012). As a result, Dr. Khobragade, through her Counsel who continues to act on her behalf, hereby moves this Court pursuant to 22 U.S.C. §254d for a dismissal of this prosecution for a lack of personal jurisdiction because on December 12, 2013, just as she was as of January 8, 2014, Dr. Khobragade was designated as a Diplomat with immunity in accordance with Article 31 of the Vienna Convention on Diplomatic Relations. *See, Devi v. Silva*, 861 F.Supp.2d at 141 (S.D.N.Y. 2012).

It is apparent that the immunity which cloaked Dr. Khobragade on December 12, 2013 should have prevented her arrest, handcuffing, jailing, strip searching and imposition of bail conditions at that time. When describing the privileges and immunities which are afforded to participants such as Dr. Khobragade, in UN sponsored international conferences, the State Department's own publication cautions and instructs at page 8 that:

Law enforcement officials (particularly in New York) should be sensitive to the existence of this situation and always coordinate with the U.S. authorities indicated in the list of

Useful Phone Numbers if confronted with an apparent offender appearing to fall into this category.

Of course the Law Enforcement Agent from the Diplomatic Security Services who was responsible for effecting the arrest of Dr. Khobragade neglected to follow this instruction. He did not call the UN Protocol office at the numbers listed on page V of the State Department publication noted above. Had he only done so he would have been informed of Dr. Khobragade's status and her arrest and humiliating and invasive personal body search would not have occurred.

The immunity commensurate with that diplomatic status conferred by her appointment as an Advisor to the UN on August 26, 2013 was to expire on December 31, 2013, some 19 days after Dr. Khobragade's arrest on December 12, 2013. The full immunity that the Defendant was lawfully entitled to on December 12, 2013 establishes that the arrest was invalid and the case must also be dismissed for that reason. Addressing such an instance, the Fourth Circuit held in *U.S. v. Al-Hamdi* that :

*Thus, under the plain language of the statute, if, **at the time he was arrested**, Al-Hamdi was entitled to diplomatic immunity under Article 37.1 of the Vienna Convention, the criminal proceedings against him must be dismissed. [Emphasis added] 356 F.3d 564, 569 (4th Cir. 2004).*

From the inception of this matter, this Court, has been clearly deprived of personal jurisdiction over Dr. Khobragade by virtue of her diplomatic immunity, but nonetheless the Court retains original subject matter jurisdiction to hear this motion and dismiss this criminal proceeding. Pursuant to 28 U.S.C. §1351, this court retains original jurisdiction over this motion because it is brought by Dr. Khobragade who is a member of the Permanent Mission of India to the United Nations. *See, Montuyo v. Chedid, 779 F.Supp.2d 60 (D.C. Dist. 2011); See also, Logan v. Dupuis, 990 F.Supp. 26, 27 n. 2 (D.D.C.1997).* Dr. Khobragade may bring the instant

motion without a waiver of her diplomatic status and immunity pursuant to 22 U.S.C. §254d, which “authorizes a dismissal on motion of action against individual entitled to immunity”.

THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND IMMUNITY

The United States ratified the Vienna Convention on Diplomatic Relations (“VCDR”), in 1972. Article 31 of the VCDR provides that “a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.” In accordance with the VCDR treaty, Congress enacted the Diplomatic Relations Act of 1978, which mandates that “[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations ... **shall be dismissed**.” 22 U.S.C. §254d. [emphasis added] This action must therefore be dismissed and the conditions of bail be discontinued.

The Second Circuit has made clear that courts must dismiss an action against anyone who is entitled to immunity under the Vienna Convention on Diplomatic Relations or other laws extending privileges and immunities. Specifically, the Court held that “current diplomatic envoys enjoy absolute immunity from civil and criminal process.” *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir.), cert. denied, — U.S. —, 131 S.Ct. 151, 178 L.Ed.2d 243 (2010); See also, *Tachiona v. Mugabe*, 386 F.3d 205, 216 (2d Cir.2004); *Montuyo v. Chedid*, 779 F.Supp.2d at 63; *Gonzalez Paredes v. Vila*, 479 F.Supp.2d 187, 191 (D.D.C.2007); *Sabbithi v. Al Saleh*, 605 F.Supp.2d 122, 130 (D.D.C.2009), vacated in part on other grounds, No. 07 Civ. 115 (D.D.C. Mar. 8, 2011). In fact, State Department has issued instructions to Law Enforcement Officers and Judges that:

*Diplomatic agents also enjoy complete immunity from the criminal jurisdiction of the host country's courts and thus **cannot be prosecuted** no matter how serious the offense unless their immunity is waived by the sending state. [emphasis added]*

US State Department: Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities at 4.

Here, India, the sending state, has not waived Dr. Khobragade's immunity and therefore this criminal prosecution must be dismissed.

Despite any sentiments that one may have regarding the unproven merits or lack thereof of this case, the fact remains that Dr. Khobragade's diplomatic status, and corresponding immunity, requires adherence to the decision of the State Department with regards to the consequences of its decision. As the Eleventh Circuit has said, "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz v. Dade County, 741 F.2d 1328, 1331 (11th Cir.1984).*

It must be pointed out that while the diplomatic designation only works prospectively from the moment of designation and onward, the attendant immunity that attaches with that diplomatic status applies retroactively and can negate a preexisting matter or prosecution. *See, Abdulaziz, 741 F.2d at 1329–30 ("the diplomatic immunity flowing from that status serves as a defense to suits already commenced.")*. Lest there be any doubt of the accuracy of that proposition, the US State Department: Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, cited above, is perfectly clear when it instructs that:

*Criminal immunity precludes the exercise of jurisdiction by the courts over an individual **whether the incident occurred prior to or during** the period in which such immunity exists.[emphasis added]*

Here, the State Department's decision to fully grant diplomatic credentials mandates the dismissal of this action in accordance with Article 31 of the VCDR and the Diplomatic Relations Act.

THIS CASE REQUIRES DISMISSAL AT THIS TIME

This proceeding has been wrongfully commenced against Dr. Khobragade. She should not have been arrested in the first place and she was indicted despite the fact that the government knew that her diplomatic status precluded a prosecution of Dr. Khobragade.

Here, obviously, a case was clearly commenced. Despite the fact that no arraignment occurred, Dr. Khobragade was arrested, physically searched, processed, brought before the Court, forced to post bail, and abide by conditions of release all in violation of her absolute immunity as a diplomat. Clearly, the continuation of the conditions of bail, the retention of Dr. Khobragade's passport and the still unrelieved imposition of release conditions (despite the United State's expulsion of Dr. Khobragade to the sending country), are part of an ongoing proceeding, the fact that there is an active Docket number in this matter suggests as much as well. Pursuant to *22 U.S.C. §254d*, this case **must** be dismissed. For the foregoing reasons, we ask that the Court:

1. Enter an order dismissing the instant case;
2. Terminate any and all conditions of bail previously imposed at the Defendant's initial appearance on December 12, 2013 including the prompt return of Dr. Khobragade's passport to the undersigned counsel;
3. Exonerate any bailment or bond previously posted on behalf of the Defendant to secure her freedom during the pendency of this matter;

4. Terminate any arrest warrants presently or previously filed inasmuch as there can be no arrest while Dr. Khobragade's diplomatic status is extant.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Daniel N. Arshack", with a long horizontal flourish extending to the right.

Daniel N. Arshack

Daniel N. Arshack, Esq. (DA2036)
Arshack, Hajek & Lehrman, PLLC
1790 Broadway – 7th Floor
New York, New York 10019
212-582-6500 Phone
212-459-0568 Fax